

Premavathy a/p Balakrishnan v Dr Premalatha a/p Rama Govinda

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL
NO A-02(NCVC)(W)-1817-09 OF 2018
HAMID SULTAN, HANIPAH FARIKULLAH AND KAMALUDIN MD
SAID JJCA
12 NOVEMBER 2019

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Succession — Will — Validity — Whether testator had testamentary capacity when he executed will — Whether there were no suspicious circumstances surrounding the making of the will — Whether evidence showed deceased and wife had jointly contributed towards buying their matrimonial home — Whether even though deceased had deliberately excluded wife from will constructive/resulting trust operated to make him/his estate liable as trustees holding half-share in matrimonial home on trust for her — Whether deceased accordingly had capacity to only dispose of his half-share in the home under his will

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The instant appeal arose out of contentious probate proceedings involving the will of a medical doctor ('the deceased') who had deliberately excluded his wife ('the respondent') from the will. The respondent, also a medical doctor, had been married to the deceased for 13 years prior to his death one month after he made the will. The relationship between the parties had deteriorated to the point that the respondent had petitioned for divorce around the time of the deceased's death. The appellant was the deceased's eldest sister and also the alternate executor and trustee of his will. Among the properties the deceased bequeathed under his will was a house ('the Klang house') that he had entered into an agreement to buy one year after his marriage to the respondent and in which the couple had lived for five years before his death. The Klang house became a thorny issue in the probate proceedings as the respondent claimed that she and her parents had contributed towards its purchase while the deceased's parents claimed that they were the ones who had contributed. The court action was commenced by the respondent who sought to nullify the will after the appellant had obtained the grant of probate. The issues before the court were whether the will was valid and whether the Klang house was a matrimonial asset which the deceased or his estate held on trust for the respondent. After a full trial, the High Court decided that the will was valid and effective; that the Klang house was a matrimonial asset in which the deceased or his estate held a half-share on trust for the respondent and that the respondent had beneficial rights to the house based on contributions that she and her parents had made towards its acquisition. In her instant appeal against the decision, the appellant wanted the Court of Appeal ('COA') to uphold the validity of the will, set aside the rest of the High Court's decision and dismiss

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- A the respondent's action. The respondent's cross-appeal was for the COA to declare the will invalid. At the appeal hearing, the appellant submitted that the trial judge erred in, inter alia: (a) finding that the Klang house was a matrimonial asset in which the deceased held a half-share on trust for the respondent; (b) not finding that the Klang house was bought and paid for by the deceased and that it was wholly his property to dispose of according to his will; and (c) not giving effect to the deceased's categorical assertions in the will that he was deliberately excluding the respondent from his will. The respondent, on the other hand, submitted that: (i) there was ample documentary evidence to show that the Klang house was a matrimonial asset, that she and her parents had contributed towards its acquisition and that she had also contributed to the household maintenance and expenses during the time she lived there together with the deceased; and (ii) the appellant failed to discharge her burden of proving that the deceased had testamentary capacity when he executed the will and also failed to dispel any suspicious circumstances surrounding the making of the will. The respondent had contended that the deceased was suffering from a disease which might have compromised his mental capacity at the time the will was made and executed.
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- E **Held**, unanimously dismissing both the appeal and the cross-appeal:
- (1) The trial judge did not err in finding that the will was valid and that the Klang house was a matrimonial asset in which the deceased or his estate held a half-share on trust for the respondent (see paras 62–63).
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- (2) This court found that during their marriage, the deceased and the respondent had purchased the Klang house as their matrimonial home and lived in it together until the deceased's demise. The trial judge had considered the respondent's and her mother's evidence with supporting documentary evidence to show that they had contributed financially to the deposit payment as well as the monthly instalment payments for the house. The appellant's witness, SD2, on the other hand, could not produce any evidence to support his assertion that he had paid towards the deceased's acquisition of the house. In totality, the evidence showed that the Klang house was indeed a matrimonial asset of the deceased and the respondent (see paras 65(a)–(b)).
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- (3) The matrimonial asset in this case could not be divided under s 76 of the Law Reform (Marriage and Divorce) Act 1976 because the respondent's marriage to the deceased was dissolved naturally upon his death. The trial judge did not err in law or in fact when he held that a half share of the matrimonial asset was held by the deceased on a resulting/constructive trust for the benefit of the respondent. The half-share was a fair, just and reasonable division in the circumstances. This meant that the deceased could only give away his 50% share in the matrimonial home under his will (see paras 65(e)–(f), (i) & (l)–(m)).
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- (4) The uncontroverted evidence of SD3 and SD4, who witnessed the execution of the will by the deceased, showed that the technical and/or formal statutory requirements of s 5 of the Wills Act 1959 had been complied with. Their testimonies also showed that the deceased's mental state during his meetings with them right up to the time of the execution of the will was lucid and sound. The appellant had also established that the deceased was of sound mind, memory and understanding when he executed the will. On the face of it, the will was rational and as such the presumption arose in law that the deceased had testamentary capacity. The contents of the medical report on the deceased produced by the respondent were never agreed upon by the appellant. The maker of the report was never called to testify. As such, there was no independent medical evidence to show that the deceased did not have testamentary capacity to execute the will. From all of the evidence adduced, there was nothing suspicious about the making of the will in the instant case (see paras 65(aa)–(ac), (ae)–(af) & (ah)).

[Bahasa Malaysia summary]

Rayuan ini timbul daripada pertikaian prosiding probet melibatkan wasiat doktor perubatan ('si mati') yang dengan sengaja mengecualikan isterinya ('responden') daripada wasiat itu. Responden, juga doctor perubatan, telah berkahwin dengan si mati selama 13 tahun sebelum kematiannya sebulan selepas dia membuat wasiat itu. Hubungan antara pihak-pihak telah merosot ke satu titik di mana responden telah mengemukakan petisyen untuk perceraian sekitar masa kematian si mati. Perayu adalah kakak sulung si mati dan juga wasi alternatif dan pemegang amanah wasiatnya. Antara harta yang ditinggalkan oleh si mati di bawah wasiatnya adalah sebuah rumah ('rumah Klang') bahawa dia telah membuat perjanjian untuk membelinya satu tahun selepas perkahwinannya dengan responden dan di mana pasangan itu telah tinggal selama lima tahun sebelum kematiannya. Rumah Klang itu menjadi isu pertikaian dalam prosiding probet kerana responden mendakwa bahawa dia dan ibu bapanya telah menyumbang ke arah pembeliannya manakala ibu bapa si mati mendakwa bahawa mereka adalah orang yang telah menyumbang. Tindakan mahkamah telah dimulakan oleh responden yang memohon untuk membatalkan wasiat itu setelah perayu memperoleh pemberian probet. Isu-isu di hadapan mahkamah adalah sama ada wasiat itu adalah sah dan sama ada rumah Klang itu adalah aset perkahwinan yang mana si mati atau harta pusakannya dipegang atas untuk responden. Selepas perbicaraan penuh, Mahkamah Tinggi memutuskan bahawa wasiat itu sah dan berkesan boleh dikuatkuasakan; bahawa rumah Klang itu adalah aset perkahwinan di mana si mati atau harta pusakanya memegang separuh bahagian atas amanah untuk responden dan bahawa responden mempunyai hak benefisial ke atas rumah itu berdasarkan sumbangan yang dia dan ibu bapanya telah buat ke arah pemerolehannya. Dalam rayuannya ini terhadap keputusan tersebut, perayu ingin Mahkamah Rayuan ('MR') untuk mengekalkan kesahihan wasiat itu,

- A mengetepikan keputusan Mahkamah Tinggi yang selainnya dan menolak tindakan responden. Rayuan balas responden adalah untuk MR mengisytiharkan wasiat itu tidak sah. Semasa perbicaraan rayuan itu, perayu berhujah bahawa hakim perbicaraan telah terkhilaf kerana, antara lain:
- B (a) mendapati bahawa rumah Klang itu adalah aset perkahwinan di mana si mati memegang separuh bahagian atas amanah bagi responden; (b) tidak mendapati bahawa rumah Klang itu telah dibeli dan dibayarkan oleh si mati dan ia adalah miliknya sepenuhnya untuk dilupuskan mengikut kehendaknya; dan (c) tidak memberi kesan kepada pengatahan mengikut kategori si mati dalam wasiat itu yang dia sengaja mengecualikan responden dari wasiatnya.
- C Sebaliknya, responden berhujah bahawa: (i) terdapat keterangan dokumentar yang mencukupi untuk menunjukkan bahawa rumah Klang itu adalah aset perkahwinan, bahawa dia dan ibu bapanya telah menyumbang ke arah pemerolehannya dan bahawa dia juga telah menyumbang kepada penyelenggaraan isi rumah dan perbelanjaan semasa dia tinggal di sana bersama-sama dengan si mati; dan (ii) perayu gagal melepaskan beban buktinya bahawa si mati mempunyai keupayaan membuat wasiat apabila dia melaksanakan wasiat itu dan juga gagal melenyapkan apa-apa keadaan yang mencurigakan semasa pembuatan wasiat itu. Responden telah menegaskan bahawa si mati menderita penyakit yang mungkin telah menjejaskan keupayaan mentalnya semasa wasiat itu dibuat dan dilaksanakan.
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Diputuskan, sebulat suara menolak kedua-dua rayuan dan rayuan balas:

- F (1) Hakim perbicaraan tidak terkhilaf kerana mendapati wasiat terseut adalah sah dan bahawa rumah Klang itu adalah aset perkahwinan yang mana si mati atau harta pusakanya memegang separuh bahagian atas amanah untuk responden (lihat perenggan 62–63).
- G (2) Mahkamah ini mendapati bahawa sepanjang perkahwinan mereka, si mati dan responden telah membeli rumah Klang itu sebagai rumah perkahwinan mereka dan tinggal bersama di situ sehingga si mati meninggal dunia. Hakim perbicaraan telah mempertimbangkan keterangan responden dan ibunya dengan keterangan dokumentar sokongan untuk menunjukkan bahawa mereka telah menyumbang dari segi kewangan untuk bayaran deposit dan juga bayaran ansuran bulanan untuk rumah tersebut. Saksi perayu, SD2, sebaliknya, tidak dapat mengemukakan apa-apa keterangan untuk menyokong penegasannya bahawa dia telah membayar untuk pemerolehan rumah si mati. Secara keseluruhan, keterangan menunjukkan bahawa rumah Klang itu sememangnya aset perkahwinan si mati dan responden (lihat perenggan 65(a)–(b)).
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- I (3) Aset perkahwinan dalam kes ini tidak boleh dibahagikan di bawah s 76 Akta Pembaharuan Undang-Undang (Perkahwinan dan Perceraian) 1976 kerana perkahwinan responden kepada si mati telah dibubarkan

secara semula jadi apabila si mati meninggal dunia. Hakim perbicaraan tidak terkhilaf dari segi undang-undang atau fakta apabila beliau memutuskan bahawa separuh bahagian aset perkahwinan adalah dipengang oleh si mati atas amanah pengakibat/konstruktif bagi manfaat responden. Separuh bahagian itu adalah pembahagian yang adil, saksama dan munasabah dalam keadaan itu. Ini bermaksud bahawa si mati hanya boleh melepaskan 50% daripada bahagiannya dalam rumah perkahwinan itu di bawah wasiatnya (lihat perenggan 65(e)–(f), (i) & (l)–(m)).

- (4) Keterangan SD3 dan SD4 yang tidak boleh dikawal, yang menyaksikan pelaksanaan wasiat itu oleh si mati, menunjukkan bahawa keperluan statutori teknikal dan/atau formal s 5 Akta Wasiat 1959 telah dipatuhi. Keterangan mereka juga menunjukkan bahawa keadaan mental si mati semasa bermesyuarat dengan mereka sehingga masa pelaksanaan wasiat itu adalah jelas dan kukuh. Perayu juga telah membuktikan bahawa si mati mempunyai akal, ingatan dan pemahaman yang baik semasa dia melaksanakan wasiat itu. Berdasarkan itu, wasiat tersebut adalah rasional dan oleh demikian andaian yang timbul dari segi undang-undang adaah bahawa si mati mempunyai keupayaan membuat wasiat. Kandungan laporan perubatan ke atas si mati yang dikemukakan oleh responden tidak dipersetujui oleh perayu. Pembuat laporan itu tidak dipanggil untuk memberi keterangan. Oleh itu, tiada keterangan perubatan yang bebas untuk menunjukkan bahawa si mati tidak mempunyai keupayaan membuat wasiat bagi melaksanakan wasiat itu. Berasaskan kesemua keterangan yang dikemukakan, tiada apa-apa yang mencurigakan tentang pembuatan wasiat itu dalam kes ini (lihat perenggan 65(aa)–(ac), (ae)–(af) & (ah)).]

Cases referred to

- Banks v Goodfellow* (1870) LR 5 QB 549, QBD (refd)
Boughton and another v Knight and others [1861–73] All ER Rep 40; (1873) LR 3 P & D 64 (refd)
Carmel Mary Soosai v Josephine Lourdasamy Ratnavathy R Soosai & Ors [1987] CLJ Rep 498, HC (refd)
Ch'ng Kheng Phong v Chung Keng Huat & Ors [2011] 8 MLJ 32, HC (refd)
Ching Seng Woah v Lim Shook Lin [1997] 1 MLJ 109; [1997] 1 CLJ 375, CA (refd)
Eu Boon Yeap & Ors v Ewe Kean Hoe [2008] 2 MLJ 868, CA (refd)
Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)
Hussey v Palmer [1972] 3 All ER 744, CA (refd)
Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97, CA (refd)

- A** *Ong Eng Hock & Anor v Ong Cheng Guan & Anor* [2018] 5 MLJ 701; [2018] 7 CLJ 154, FC (refd)
Sarah binti Abdullah @ Hew Lee Ling (P) [1999] MLJU 586, HC (refd)
Tan Cheu Kee v Lim Siew Hwa [2016] MLJU 1599; [2016] 1 LNS 1684, HC (refd)
- B** *Tay Choo Foo @ Tay Chiew Foo v Tengku Mohd Saad @ Tengku Arifaad bin Tengku Mansur & Ors (all acting as administrators of the estate of Tunku Mansur bin Tunku Yaacob, deceased) and another appeal* [2009] 1 MLJ 289; [2009] 2 CLJ 363, CA (refd)
Tho Yow Pew & Anor v Chua Kooi Hean [2002] 4 MLJ 97; [2002] 4 CLJ 90, CA (refd)
- C** *Udham Singh v Indar Kaur* [1971] 2 MLJ 263, FC (refd)
Wachtel v Wachtel [1973] 1 All ER 829, CA (refd)
Wong Kim Foong (F) v Teau Ah Kau @ Chong Kwong Fatt [1998] 1 MLJ 359; [1998] 1 CLJ 358, HC (refd)
- D** *Yoong Sze Fatt v Pengkalen Securities Sdn Bhd* [2010] 1 MLJ 85, CA (refd)

Legislation referred to

- Evidence Act 1950 s 114(g)
 Inheritance (Family Provisions) Act 1971 s 3
E Law Reform (Marriage and Divorce) Act 1976 s 76
 Wills Act 1959 s 5

Appeal from: Civil Suit No AB22NCVC-14-06 of 2017 (High Court, Taiping)

- F** *Vengetraman Manickam (Jeyaratnam & Co) for the appellant.*
Cyndi Chow Li Kian (Lim Eu Jin and Ong Hui Yi with her) (Josephine, LK Chow & Co) for the respondent.

G Kamaludin Md Said JCA:

INTRODUCTION

- H** [1] The appeal before this court was brought by the appellant vide a notice of appeal dated 5 September 2018. Notwithstanding the appellant's appeal, the respondent has also filed a notice of cross-appeal dated 2 November 2018.

- I** [2] The appellant in this present appeal was the defendant (Premavathy a/p Balakrishnan), whereas the respondent was the plaintiff (Dr Premalatha a/p Rama Govinda) in the Taiping High Court Writ Summons No AB 22NCVC-14-06 of 2017 ('the Taiping writ').

[3] This appeal arose out of a contentious probate proceedings in the Taiping writ and is a decision after a full trial.

[4] The respondent filed the Taiping writ against the appellant on 13 June 2017 to nullify the will dated 14 February 2016 left behind by Dr Ganeshwaran a/l KT Balakrishnan ('the Dr Ganeshwaran'). A

[5] The case went for a full trial and hearing of seven witnesses including both the appellant and the respondent. The agreed issues to be tried at the High Court were mainly whether the will dated 14 February 2016 was valid and whether the Klang house is a matrimonial asset or Dr Ganeshwaran or his estate held the Klang house on trust for the respondent. B

[6] After hearing the testimony of the various witnesses and the issues, the learned judicial commissioner ('the learned JC') held that the will dated 14 February 2016 is valid and effective ('adalah sah dan berkuatkuasa') (at p 7, para 11 *rekod rayuan tambahan*). C

[7] However, despite holding that the late Dr Ganeshwaran's will dated 14 February 2016 was valid and effective, the learned JC went on to hand down several ancillary and related orders. D

[8] The grounds of judgment is at pp 33–72 of the supplementary record of appeal. The decision is reflected in the order dated 9 August 2018 which is at pp 6–8 of the supplementary record of appeal), inter alia, as follows: E

1. Wasiat bertarikh 14.2.2016 yang dibuat oleh Si Mati, Dr Ganeshwaran a/l KT Balakrishnan adalah sah dan berkuatkuasa.

2. Hartanah sebuah rumah yang beralamat di No 62, Lebuhr Peria, Taman Radzi, 41200 Klang, Selangor Darul Ehsan yang dipertikaikan bukanlah harta Si Mati, Dr Ganeshwaran a/l KT Balakrishnan sepenuhnya dan harta itu dipegang sebahagian untuk amanah bagi pihak Plaintiff dan bahagian itu tidak boleh dijadikan subjek wasiat Si Mati. F

3. Si Mati, Dr Ganeshwaran a/l KT Balakrishnan memegang Setengah bahagian (1/2) bahagian hartanah yang beralamat di No 62, Lebuhr Peria, Taman Radzi, 41200 Klang, Selangor Darul Ehsan itu sebagai amanah untuk Plaintiff. G

SEDEMIKIAN DAN ADALAH SELANJUTNYA DIHAKIMI BAHAWA:-

4. Plaintiff sebagai isteri kepada Si Mati, Dr Ganeshwaran a/l KT Balakrishnan mempunyai hak dan kepentingan ke atas Aset Perkahwinan yang beralamat di No 62, Lebuhr Peria, Taman Radzi, 41200 Klang, Selangor Darul Ehsan. H

5. Si Mati, Dr Ganeshwaran a/l KT Balakrishnan dan/atau Estet Si Mati/Defendan dan mana-mana wakil, agen atau ahli keluarga Defendan memegang Setengah bahagian (1/2) Aset Perkahwinan yang beralamat di No 62, Lebuhr Peria, Taman Radzi, 41200 Klang, Selangor Darul Ehsan atas dasar amanah untuk Plaintiff sebagai pihak yang mempunyai hak benefisial berdasarkan sumbangan yang dibuat secara peribadi dan melalui sumbangan ibu bapa Plaintiff ke atas Aset Perkahwinan tersebut dan/atau sebagai pihak yang mempunyai hak dan kepentingan sebagai seorang isteri yang sah ke atas Aset Perkahwinan tersebut. I

A 6. Kos sebanyak RM15,000.00 tertakluk kepada 4% Alokatur dibayar kepada Plaintiff daripada Estet Si Mati.

B [9] The appellant and the respondent are not satisfied with a portion of the above order. The appellant is essentially appealing against paras 2–6 of the order dated 9 August 2018 for this court to vary the order in the manner that para 1 of the order to be maintained, the remaining paragraphs to be removed and substituted with an order that the respondent’s suit against the appellant is to be dismissed with costs to be payable by the respondent to the appellant.

C [10] The respondent appealed against para 1 of the order for this court to vary the order to the extent that Dr Ganeshwaran’s will dated 14 February 2016 to be invalidated, rendered ineffective and thereby struck down.

D AGREED FACTS

[11] Before the High Court, the agreed facts are as follows:

- (a) the respondent is the widow of Dr Ganeshwaran a/l KT Balakrishnan;
- E (b) the appellant, Premavathy a/p Balakrishnan who is the eldest sister of Dr Ganeshwaran is the alternate executor and trustee appointed by Dr Ganeshwaran in his will dated 14 February 2016;
- (c) the respondent and Dr Ganeshwaran were married on 6 July 2003 and were previously working in Taiping;
- F (d) Dr Ganeshwaran had executed a sale and purchase agreement dated 31 May 2004 to purchase a house with an address at No 62, Lebuhr Peria, Taman Radzi, 41200 Klang, Selangor Darul Ehsan (‘the Klang house’);
- G (e) the respondent and Dr Ganeshwaran had previously stayed with Dr Ganeshwaran’s family in Taiping and thereafter had moved out into a rented house in Taiping;
- (f) around the year 2008, the respondent and Dr Ganeshwaran moved out of Taiping, Perak;
- H (g) both the respondent and Dr Ganeshwaran were medical doctors;
- (h) Dr Ganeshwaran was having some health problems and had been treated by one, Dr Ganesanathan Shanmuganathan (‘the gastroenterologist’);
- I (i) there were divorce proceedings pending between the respondent and Dr Ganeshwaran at the point in time of Dr Ganeshwaran’s death on 14 March 2016. In the then pending divorce proceedings, the respondent was represented by Messrs M Jayasingam & Co, whereas Dr Ganeshwaran was represented by Messrs Sada Raman & Co;

- (j) after Dr Ganeshwaran's death on 14 March 2016, there was communication between the respondent's present solicitors (Messrs Josephine LK Chow & Co) and Messrs Sada Raman & Co; A
- (k) upon Dr Ganeshwaran's passing on 14 March 2016, the respondent had on 18 March 2016, lodged a caveat on Dr Ganeshwaran's estate at the Kuala Lumpur High Court pursuant to Caveat No WA-Kaveat-784-03 of 2016; B
- (l) the appellant, Premavathy a/p Balakrishnan had thereafter applied for a grant of probate through Originating Summons No BA-32NCVC-536-09 of 2016 at the Shah Alam High Court ('the probate High Court'); C
- (m) after the grant of probate was issued, the respondent filed a citation at the probate High Court on 21 December 2016; and
- (n) after the citation was served on Premavathy, her then solicitors, Messrs Sada Raman & Co, returned the grant of probate to the probate High Court in Shah Alam on 3 February 2017. D

THE MAIN ISSUES

[12] In the appeal and cross-appeal, the focus would only on two issues ie for the appellant, the issue is whether there is a trust for the Klang house in favour of the respondent and if so, is the will subject to the trust. In the cross-appeal, the issue is whether Dr Ganeshwaran's will dated 14 February 2016 is valid.

Whether there is a trust for the Klang house in favour of the respondent and if so is the will subject to the trust?

[13] The appellant raised five grounds of appeal as appears in the memorandum of appeal dated 5 November 2018 and the supplementary memorandum of appeal dated 18 March 2019.

[14] Briefly, the five grounds can be summed up in the following that the learned JC erred in fact and in law:

- (a) when he decided that the Klang house was not the deceased Dr Ganeshwaran's entirely and half of it was held on trust for the respondent and cannot be subject to the deceased's will dated 14 February 2018 despite the will being held to be valid and effective;
- (b) in arriving at his decision dated 9 August 2018, when by all accounts he took into account irrelevant considerations and failed to take into account relevant consideration;
- (c) when he allowed the respondent's claim partially with costs;

- A** (d) failed to make accurate factual evaluations in arriving at his findings and handing down his decision dated 9 August 2018; and
- (e) applied wrong and irrelevant principles of law in arriving at his decision on 9 August 2018.
- B** [15] The appellant's complaint is against the findings of the learned JC that there is a trust in favour of the respondent based on the following facts:
- C** (a) merely making reference to a Maybank account savings book that is submitted by the respondent's mother (SP2), that there is evidence of payment of deposit for the Klang house;
- (b) accepting the evidence of the appellant's father (SD2) that he paid the deposit for the Klang house merely because he did not furnish his bank account transaction details which were more than 14 years ago;
- D** (c) accepting the evidence of the respondent that she contributed to the maintenance of the Klang house as well as the medical expenses of the deceased, Dr Ganeshwaran when the respondent fails to produce a single receipt of payment for any instalment payment nor for any payment of household expenses whatsoever nor medical expenses;
- E** (d) without any documentary and in particular medical evidence he accepted unsubstantiated and totally uncorroborated and unsupported testimony as well as the bare allegation of the respondent that Dr Ganeshwaran had an alcohol addiction;
- F** (e) accepting that the respondent transferred funds from her account to the deceased, Dr Ganeshwaran's account when there is not even an iota of evidence nor a single transaction which can be adduced or established by reference to the respondent's Maybank statements that has been submitted;
- G** (f) in the absence of any medical evidence whatsoever, he accepted that the deceased, Dr Ganeshwaran had serious health problems and that it was the respondent who played the main role in running the household when her testimony was thoroughly challenged and her evidence discredited in cross-examination;
- H** (g) failing to accept the evidence against the respondent which is admitted by the respondent herself that the respondent was dismissed from government service, that she never held any other permanent positions and even if she did, the respondent failed to adduce any evidence whatsoever of her service with anybody nor proof of any income whatsoever during the entire course of the trial; and
- I** (h) further the learned JC failed to take into account the following:
- (i) the respondent did not even know that the Klang house had been

- bought by the deceased, Dr Ganeshwaran in the first place. She admits in evidence that she never saw the house prior to it being purchased; A
- (ii) this is also consistent with the evidence given by SD2 ie Dr Ganeshwaran's father, Mr Balakrishnan a/l KM Thanabaloo that he was the one who paid the initial booking fee of RM5,000 and also gave the balance deposit of RM22,880 to his son, Dr Ganeshwaran for the purchase of the Klang house; B
- (iii) SD2, had also arranged for the bank loan at the HSBC Bank in Taiping, although the house was in Klang. At the time the house was purchased on 31 May 2004, both Dr Ganeshwaran and the respondent were residing and working in Taiping. Dr Ganeshwaran had continued to service the instalments for the Klang house until he passed away on 14 March 2016; C
- (iv) the respondent never produced a single receipt of payment to substantiate her assertions that she had contributed to the purchase, maintenance and/or payment of installments for the Klang house; D
- (v) the respondent, inter alia, alleges that her parents contributed a sum of RM35,000 for the purchase of the Klang house and that was the sum of the initial deposit. The question that was never addressed was why a sum of RM35,000 was purportedly given by SP2 when the initial deposit was only RM27,880 for the Klang house? E
- (vi) SP2 the respondent's mother also alleges that a sum of RM35,000 was taken out from the joint account with her husband and paid to Dr Ganeshwaran. However, the respondent nor her mother are unable to justify in any manner whatsoever as to how, when or where a sum of RM35,000 was baselessly alleged to have been paid to Dr Ganeshwaran; F
- (vii) the only alleged evidence to support this baseless allegation is the fact that the respondent's mother, Santhiradevi, appears to have withdrawn a sum of RM35,000 from her account on 22 April 2004 which was more than one month before the sale and purchase agreement was executed by Dr Ganeshwaran on 31 May 2004; G
- (viii) a careful perusal of exh P34 ie the Maybank passbook would also indicate large amounts that have been periodically withdrawn from the joint account by Santhiradevi and/or her husband Rama Govinda; H
- (ix) when pressed further on why those large amounts were withdrawn from her account, Santhiradevi the mother in law candidly admits that the said amounts were to be placed in fixed deposit; and I
- (x) in the absence of any tangible evidence whatsoever that the respondent's parents had actually given a sum of RM35,000 to Dr Ganeshwaran, the

A respondent's bare assertion that such a sum was actually given must also fail.

B [16] In the circumstances, it was submitted that the only one veritable conclusion can be arrived at, in that, at all material times, the Klang house was bought and paid for by Dr Ganeshwaran alone and remains his assets which is to be disposed according to his last will and testament dated 14 February 2016.

C [17] The appellant highlighted the following errors in law made by the learned JC as follows:

- (a) that the learned JC used the terminology 'matrimonial asset' instead of the 'deceased's asset' or the deceased's estate to reach a decision in this matter;
- D (b) when the Klang house was divided equally without any basis and reliance of any prevailing and applicable legal provision;
- (c) when the learned JC applied and referred to the wrong provisions of law ie the Law Reform (Marriage and Divorce) Act 1976 to arrive at his decision;
- E (d) when the learned JC failed to apply the correct provisions of law namely the provisions contained in the Wills Act 1959 and the Inheritance (Family Provisions) Act 1971 in reaching his decision;
- F (e) when the learned JC decided that the Klang house was a matrimonial asset and as such the respondent was entitled to a portion of it based on the principles of resulting trust when in the course of the trial, the respondent failed to adduce any elements of resulting trust whatsoever either in fact or in law;
- G (f) when the learned JC applied the wrong principles of law in deciding that Dr Ganeshwaran cannot will out the Klang house in entirety, which is registered solely in his name, despite the respondent failing to show any legal right to the Klang house;
- H (g) when the learned JC failed to base his decision on any applicable legal principles and trust principles especially on any principles of resulting trust which is said to arise in favour of the respondent, when in effect, it is totally non-existent; and
- I (h) when the learned JC failed to apply the correct and applicable legal provisions canvassed by the appellant and which stands in favour of the appellant.

[18] The appellant submitted that the legal position in this matter is actually quite simple and straight forward that Dr Ganeshwaran died leaving behind his

will dated 14 February 2016. The will had confirmed with all the provisions of the Wills Act 1959 and was held to be valid and effective by the High Court. As the will dated 14 February 2016 is valid, the distribution of the estate of Dr Ganeshwaran must be entirely be in accordance with the wishes contained in his last will and testament. There cannot be any departure or variation to his last wishes as to whom he wishes to leave his estate to.

A

B

[19] It was the appellant's submission that there is in effect a specific provision under Malaysian law which has not been alluded to or which has not been pleaded specifically by the respondent ie the provisions of the Inheritance (Family Provision) Act 1971 in particular, s 3, which is para-phrased below:

C

Section 3 specifically provides that

... 3(i) Where, after the commencement of this Act, a person dies domiciled in Malaysia leaving — (a) a wife or husband ...

D

... then if the court on application by or on behalf of any such wife, husband, daughter or son as aforesaid (in this Act referred to as a 'dependant' of the deceased) is of the opinion that the disposition of the deceased estate effected by his will, or the law relating to intestacy, or the combination of his will and that law, is not such as to make reasonable provision for the maintenance of that dependant, the court may order that such reasonable provision as the court thinks fit shall, subject to such conditions or restrictions, if any, as the court may impose, be made out of the deceased's net estate for the maintenance of that dependant ...

E

[20] As the respondent is bound by her pleadings, she is not entitled to any such relief nor is she entitled to anything from Dr Ganeshwaran's estate pursuant to a non-existent trust.

F

[21] The appellant referred to the unreported decision in *Tan Cheu Kee v Lim Siew Hwa* [2016] MLJU 1599; [2016] 1 LNS 1684. This case adopts and states the principle of law that is applicable to the present facts and as set out in the English Case of *Boughton and another v Knight and others* [1861–73] All ER Rep 40; (1873) LR 3 P & D 64 in particular at para [16] on pp 9–10 as follows:

G

... [16]The law is clear, in that, even if the testator was wrought with grief, anger or spite when executing a will, it does not take away his ability or capacity to execute it. This was well stated in the English case of *Boughton v Knight* (1873) LR 3 P & D 64:

H

... every one is left free to choose the person upon whom he will bestow his property after death entirely unfettered in the selection he may think proper to make. He may disinherit, either wholly or partially, his children, and leave his property to strangers to gratify his spite, or to charities to gratify his pride, and we must give effect to his will, however much we may condemn the course he has pursued.

I

- A Thus, it is well settled that the duty of the court is to give effect to the will of the testator and not deprive him of the right to select the beneficiaries based on his knowledge of their characters, of their past history, and future prospects and needs of his spouse or children. Therefore, having considered the evidence in its entirety, I find that there is nothing irrational about the Deceased leaving his wife, the Defendant, out of the Will. ...

- C [22] The appellant submitted further that if this court were to uphold the decision of the learned JC in the Taiping writ in its entirety, then the floodgates will be opened. Very simply, this would mean that every spouse who has been excluded from a deceased's will, will be entitled to claim from the estate of the deceased on the basis of a resulting trust or constructive trust, purely on the basis that they were married to the deceased.

- D [23] The appellant in this regard draws reference to the case of *Tan Cheu Kee* the facts of which are on all fours with the present case. Particular reference is drawn to para [14] on p 9 as follows:

- E ... [14] The deceased has consciously left the defendant out of the will and states categorically therein that he is aware that he was not leaving anything under the will to his wife, the defendant. The deceased seems to have done this deliberately because of their estranged marital relationship ...

- F [24] As per the facts of *Tan Cheu Kee's* case, Dr Ganeshwaran had consciously left the respondent out of his will dated 14 February 2016 and states categorically therein that he is aware that he was not leaving anything under the will to his wife, the respondent. Dr Ganeshwaran seems to have done this deliberately because of their estranged marital relationship. The evidence shows that the relationship between Dr Ganeshwaran and the respondent had significantly deteriorated and strained around November 2015 in that the respondent in her testimony admitted that she had left and never went back to the Klang house after 8 November 2015.

- H [25] Further, against the backdrop of this, vide exh P4 at p 72 of the *rekod rayuan* (Jld 2C), the respondent initiates divorce proceedings against Dr Ganeshwaran. Even on the date of Dr Ganeshwaran's death (14 March 2016), a final letter is sent by the respondent's solicitors (Messrs M Jayasingam & Co) to Dr Ganeshwaran's solicitors (Messrs Sada Raman & Co) stating that the respondent is affirmative in going through the divorce and is not willing to meet Dr Ganeshwaran for a one to one meeting.

- I [26] The law as summarised in *Tan Cheu Kee's* case earlier, is very clear in that even if the testator was wrought with grief, anger or spite when executing a will, it does not take away his ability or capacity to execute it. Thus it is well settled that the duty of the court is to give effect to the will of the testator and not

deprive him of the right to select the beneficiaries based on his knowledge of their characters and their past history. Having regard to the evidence in its entirety and the factual antecedents of the relationship between Dr Ganeshwaran and the respondent, there is nothing irrational about Dr Ganeshwaran leaving the respondent out of his will.

A

B

[27] The appellant also referred to the principles enunciated in the locus classicus cases of *Wachtel v Wachtel* [1973] 1 All ER 829 (CA) and *Hussey v Palmer* [1972] 3 All ER 744 (CA) to establish why there cannot be a resulting trust or constructive trust arising in howsoever manner.

C

[28] On the other hand, the respondent submitted that there is no error committed by the learned JC with regards to paras 2–6 of the order dated 9 August 2018. It was submitted that during trial, documentary evidence from Messrs Sada Raman & Co, (being the previous solicitor for Dr Ganesh) as well as the defendant herself confirms and corroborates the respondent's submission that the house is indeed a matrimonial property/asset:

D

- (a) the respondent refers to p 76 of the record of appeal — *Jld* 2C ie the letter from Messrs Sada Raman & Co (on instructions from Dr Ganeshwaran himself) states that ‘... division of the matrimonial assets will depend on the outcome of the proposed one to one meeting, if it takes place’;
- (b) the respondent refers to p 83 of the record of appeal — *Jld* 2C ie the letter from Messrs Sada Raman & Co (on instructions from Mr KT Balakrishnan a/l Thanabaloo) which mentioned on multiple occasions that the house in Klang is a matrimonial home; and
- (c) the respondent refers to pp 101–110 of the record of appeal — *Jld* 2C ie the *afidavit balasan defendan-defendan* whereby the defendant herself acknowledged and affirmed under oath that the house in Klang is a ‘rumah suami isteri’.

E

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[29] Despite documentary evidence as above, the appellant and her father, Mr KT Balakrishnan (DW2) were being inconsistent and in denial during trial when they take the contrary position and maintain that the house in Klang is not a matrimonial home.

H

[30] Albeit taking this contrary position, the respondent submitted that the appellant and Mr KT Balakrishnan's position remain a bare assertion as their contentions are without the support of any shred of documentary evidence in the common bundle of documents that their position is the correct one. This was further admitted and confirmed by the appellant and Mr KT Balakrishnan during cross-examination at pp 219–220 of the record of appeal — *Jld* 2B and pp 312–314 of the record of appeal — *Jld* 2B.

I

- A [31] On the other hand, the respondent and her mother (Madam Sandiradavi @ Sandra Devi a/p V Ramasamy) have testified in court with supporting documentary evidence that they have contributed financially to the monthly instalment payments as well as the deposit payment of the house. Their testimonies together with supporting evidence are as follows:
- B (a) Q&A 13, Q&A 15 and Q&A 16 of the respondent's witness statement (*the respondent's contribution*) — see pp 6, 8 and 9 of the record of appeal — *Jld 2A*;
- C (b) Q&A 7 and Q&A 8 of Madam Sandiradavi @ Sandra Devi a/p V Ramasamy's witness statement (*the respondent parents' deposit payment*) — see p 51 of the record of appeal — *Jld 2A*;
- (c) see pp 4–71 of the record of appeal — *Jld 2C* for the respondent's statement of account from Maybank Bhd; and
- D (d) see pp 220–233 of the record of appeal — *Jld 2D* for Madam Sandiradavi @ Sandra Devi a/p V Ramasamy's joint savings account passbook from Malayan Banking Bhd.
- E [32] Premised on the above, the respondent submitted that learned JC did not err in law and fact when he relied on the testimonies of the respondent and Madam Sandiradavi @ Sandra Devi a/p V Ramasamy as well as the Court of Appeal decision of *Ching Seng Woah v Lim Shook Lin* [1997] 1 MLJ 109; [1997] 1 CLJ 375.
- F [33] The respondent's stance is that in the course of marriage with Dr Ganeshwaran, the respondent had:
- G (a) paid the instalment payments of the matrimonial property since 2006;
- (b) the respondent's parents have assisted in the deposit payment of the house back in 2004; and
- H (c) the respondent had all these while contributed to the household maintenance/expenses and the cost of taking care of Dr Ganeshwaran during the times when he was unwell. On this point, the respondent refers this court to the re-examination of the respondent at p 165 of the record of appeal — *Jld 2A*.
- I [34] In light of the respondent's contributions to the matrimonial property as well as to the marriage with Dr Ganeshwaran, the respondent submitted that a constructive trust is to be imputed and imposed on the matrimonial property for the benefit of the respondent.

Whether Dr Ganeshwaran's will dated 14 February 2016 is valid or not?

A

[35] The respondent's stance is that the will dated 14 February 2016 is not valid. The learned JC accordingly held that the will dated 14 February 2016 is a valid and binding will of the late Dr Ganeshwaran.

B

[36] The respondent submitted that the learned JC had erred in law and in fact in reaching the above finding because the validity of the will dated 14 February 2018 is pivotal to the respondent's case and is a different issue altogether from the matrimonial property, constructive trust and the division of matrimonial property issues.

C

[37] It was submitted that the learned JC had overlooked the seriousness of this issue, misconstrued the documentary evidence presented before him as well as the testimonies of witnesses in holding that the will dated 14 February 2016 is a valid and binding will of the late Dr Ganeshwaran (see para 37 of the grounds of judgment). The respondent contended that the learned judge's errors are as follows:

D

(a) when he held that the respondent cannot be giving evidence as a doctor with regards to her testimony on Dr Ganeshwaran's condition:

E

(i) at all material times, the respondent was not giving evidence as an expert. Albeit a medical practitioner by profession, the respondent was giving evidence as the wife of the late Dr Ganeshwaran and her evidence was based on her own observation of Dr Ganeshwaran's condition as she was living with Dr Ganeshwaran as well as the original medical report prepared Dato Dr Ganesanathan, being the physician who was treating Dr Ganeshwaran at all material times. For the respondent's testimony see pp 40–46 of the record of appeal — *Jld* 2A and pp 174–175 of the record of appeal — *Jld* 2A;

F

G

(b) when he subsequently held that 'keterangan pakar adalah perlu' to determine Dr Ganeshwaran's testamentary capacity but he failed to place the onus/burden of proof on calling of this expert upon the propounder of the will dated 14 February 2016, the appellant:

H

(i) undeniably, the appellant had not produced any iota of evidence pertaining to Dr Ganeshwaran's testamentary capacity, but the learned JC still held that the will dated 14 February 2016 is a valid and binding will of the late Dr Ganeshwaran;

I

(c) when he accepted the evidence of SD3 — Mr Leow Kim Meng when he remarked 'Oleh itu, keterangan pakar adalah perlu, apa lagi SD3 dan SD4 tidak melihat sebarang kecacatan dalam pemikiran si mati semasa si mati menandatangani wasiat itu' and 'beliau terpaksa menunggu si

- A mati pulang ke rumah pada 14.2.2016 semasa membawa wasiat itu untuk ditandatangani’ to establish that the will dated 14 February 2016 is properly created and executed:
- B (i) these statements of SD3 cannot be sufficiently credible to establish testamentary capacity and/or that the will dated 14 February 2016 was properly executed in light of SD3’s failure to produce the ‘Declaration Form’ by Dr Ganeshwaran as well as the evidence by SD3 himself during cross-examination that he could not recognise/identify the real Dr Ganeshwaran when a photo was shown to SD3 to assist him in the identification process. See pp 436–438 of the record of appeal — *Jld 2B* (Mr Leow’s testimonies); and
- C (d) when he held ‘Mahkamah ini bersetuju dengan hujahan peguamcara Defendan bahawa tiada apa-apa keterangan perubahan yang boleh menunjukkan Plaintiff (Dr Ganesh) tidak mempunyai kapasiti untuk membuat wasiat’ to hold that the will dated 14 February 2016 is valid:
- D (i) there is in fact medical evidence that Dr Ganeshwaran is suffering from a medical condition known as ‘encephalophathy’ which the respondent’s contends to have affected his mental capacity — see Dato’ Dr Ganesanathan’s medical report in p 1 of the record of appeal — *Jld 2C*;
- E (ii) in light of the medical condition above, the onus/burden of proof following the Federal Court case of *Gan Yoke Chin* lies on the appellant (not the respondent!), being the propounder of the will dated 14 February 2016, to establish that Dr Ganeshwaran had the necessary testamentary capacity and to dispel all surrounding circumstances in the making of the will dated 14 February 2016; and
- F (iii) undeniably, there was no cogent evidence by the appellant throughout the course of trial.
- G [38] The respondent submitted that based on the surrounding circumstances in the creation of the will dated 14 February 2016 together with the testimonies of the witnesses of the will, Mr Leow Kim Meng (DW3) and Ms Hong Pek Boey (DW4), it is the respondent’s submission that the appellant
- H had failed to discharge her burden of proof in establishing testamentary capacity of Dr Ganeshwaran at all material times and to dispel the factual suspicious circumstances in the creation of the will dated 14 February 2016.
- I [39] In light of the appellant’s failures, the respondent submitted that the ‘inescapable and irrefutable conclusion’ must therefore be that the will dated 14 February 2016 by Dr Ganeshwaran is not a valid and binding will.
- [40] It is an undisputed fact that Dato Dr Ganesanathan was at all material times Dr Ganeshwaran’s treating physician. Dato Dr Ganesanathan have duly

prepared a medical report on Dr Ganeshwaran's condition and the original copy of the said medical report was produced during trial. See p 1 of the record of appeal — *Jld 2C*.

A

[41] The appellant herself referred to and relied upon Dato Dr Ganesanathan's medical report in her statement of defence. In para 12 of the defence at p 49 of the record of appeal — *Jld 1*, the appellant pleaded as follows:

B

Secara khususnya, dengan merujuk kepada perenggan 18 Penyata Tuntutan Plaintiff, Defendan akan pada tarikh perbicaraan kelak mengemukakan laporan perubatan dari doktor pakar Si Mati, iaitu Dato Dr Ganesanathan Shanmuganathan yang membuktikan kesemua rawatan perubatan yang diterima dari bulan Mac tahun 2014 sehingga Si Mati meninggal dunia pada 14.3.2016 di bawah rawatan doktor pakar tersebut.

C

[42] Despite the appellant's reliance on the contents of the said medical report, the appellant changed her position during trial and objected to the medical report which resulted in it being marked as exh ID1. The learned JC erred when he refused to convert the same to exh P1 despite the respondent's producing and tendering the original copy of the medical report.

D

E

[43] Undeniably, Dato Dr Ganesanathan was not called as a witness by parties during trial. It was not disputed that the appellant had confirmed she had knowledge of Dato Dr Ganesanathan's medical report and had relied on the contents of the medical report in her pleadings. The appellant's evidence is at pp 221–222 of the record of appeal — *Jld 2B*.

F

[44] Being the physician that had treated Dr Ganeshwaran from the onset, Dato Dr Ganesanathan had diagnosed Dr Ganeshwaran to be suffering from a condition known as 'decompensated liver disease with encephalopathy' in 2014. See p 1 of the record of appeal — *Jld 2C*.

G

[45] With the diagnosis of 'encephalopathy', the respondent had furnished the court with the definition of 'encephalopathy' as follows:

H

Encephalopathy — Is a *general term that means brain disease, damage, or malfunction. The major symptom of encephalopathy is an altered mental state.* The causes of encephalopathy are numerous and varied; they include infections, anoxia, metabolic problems, toxins, drugs, physiologic changes, trauma and other causes. Encephalopathy is often considered a complication of a primary problem such as alcoholic cirrhosis, kidney failure or anoxia.

I

(https://www.medicinenet.com/encephalopathy/article.htm#encephalopathy_definition_and_overview)

A [46] It was the respondent's submission that Dr Ganeshwaran, having been diagnosed with encephalopathy since 2014 coupled with the fact that his condition never improved but was steadily worsening, give rise to the presumption that Dr Ganeshwaran may not have the testamentary capacity to create and/or execute the will dated 14 February 2016.

B [47] In light of the respondent's challenge, the Federal Court decision of *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309 was referred to where Chief Justice Steve Shim FCJ (as he was then) applied the testamentary capacity test as enunciated by Chief Justice Cockburn in *Banks v Goodfellow* (1870) LR 5 QB 549 and held as follows:

C It is trite law that for a will to be valid, a testator must have testamentary capacity. Whether a testator has testamentary capacity depends on the facts of each case. What is meant by testamentary capacity has been laid down by Chief Justice Cockburn more than a century ago in *Banks v Goodfellow* (1870) LR 5 QB 549.

D This case was cited copiously by the Court of Appeal in the instant case. For the sake of emphasis it is appropriate to repeat the sentiments expressed by Cockburn CJ who said, inter alia:

E It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties — that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.'

F

[48] The Federal Court in *Gan Yoke Chin's* case further held as follows:

G As regards the burden of proof, the Court of Appeal quite rightly stated the settled law ie, that where the validity of a will was challenged, the burden of proving testamentary capacity and due execution lay on the propounder of the will as well as dispelling any suspicious circumstances surrounding the making of the will.

H [49] Following *Gan Yoke Chin's* case, it was the respondent's submission that the legal burden of proving and establishing Dr Ganeshwaran's testamentary capacity and due execution of the will dated 14 February 2016 lies with the appellant, being the propounder/executor of the will dated 14 February 2016. Similarly, the appellant also bears the legal burden to dispel all suspicious circumstances surrounding the making of the will.

I [50] The respondent submitted that the appellant have failed to produce any cogent documentary evidence and/or oral evidence to discharge her burden in proving and establishing that Dr Ganeshwaran had the requisite testamentary capacity when he created and executed the will dated 14 February 2016. At the

same time also failed to produce any documentary evidence and/or oral evidence to dispel the suspicious circumstances surrounding the making of the will dated 14 February 2016.

A

[51] Whilst the respondent took the position that the learned JC had erred when he refused to convert exh ID1 to exh P1, in light of the original medical report being produced, he further erred in fact and in law when he went on to hold that the will dated 14 February 2016 is still a valid and binding will of the late Dr Ganeshwaran, in the absence of any form of evidence from the defendant's end to support the contention that Dr Ganeshwaran that the requisite testamentary capacity.

B

C

[52] It was submitted that the suspicious circumstances in question revolves around the appellant's witnesses, namely, Mr Leow Kim Meng (being the drafter as well as one of the witness of the will dated 14 February 2016) and Ms Hong Pek Boey (being the other witness of the will dated 14 February 2016). The pertinent suspicious grounds are as follows:

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- (a) Mr Leow (DW3) could not explain the process of creating the will dated 14 February 2016 and he appears to be inconsistent, shifty and defensive during cross-examination. Mr Leow (DW3) eventually admitted during cross-examination that he did not explain the process of the making of a will to Dr Ganeshwaran at all. See pp 390–391 of the record of appeal — *Jld* 2B;
- (b) Mr Leow (DW3) admitted during cross-examination that he did not keep any documents and/or records which he has received from Dr Ganeshwaran in preparation of the will dated 14 February 2016 despite being a Senior Estate Planner with Top Will Writer Award from Rockwills thus there is no evidence to prove that Dr Ganeshwaran was the individual that had appointed Mr Leow at all material times. See pp 377–379 of the record of appeal — *Jld* 2B;
- (c) Mr Leow (DW3) admitted during cross-examination that he contradicted his own witness statement. See pp 388–390 of the record of appeal — *Jld* 2B;
- (d) Mr Leow (DW3) has failed to produce the 'Declaration Form', which is an integral piece of evidence to prove Dr Ganeshwaran's declaration/approval of the contents of the will dated 14 February 2016 as well as to establish Dr Ganeshwaran is of sound mind when he created and executed the will dated 14 February 2016. See pp 423–424 of the record of appeal — *Jld* 2B; and
- (e) Mr Leow (DW3) and Ms Hong (DW4) were not able to recognise the late Dr Ganeshwaran before and after a photo of Dr Ganeshwaran was shown to both DW3 and DW3 to them in the identification process.

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A Ms Hong (DW4) also admitted under cross-examination that there is a possibility that person signing the will dated 14 February 2016 is not Dr Ganeshwaran and is a different man! See pp 436–438 of the record of appeal — *Jld* 2B (Mr Leow’s testimonies) and pp 457–458 of the record of appeal — *Jld* 2B (Ms Hong’s testimonies).

B [53] From the testimonies of Mr Leow (DW3) and Ms Hong (DW4) above, it cannot be denied that the creation of the will dated 14 February 2016 is doubtful and dubious. The most pertinent suspicion being the possibility that person appointing Mr Leow and the person signing the will dated 14 February 2016 is not Dr Ganeshwaran at all.

C [54] In light of the suspicious circumstances above, it is undisputed that the appellant had not produced an iota of contemporaneous documentary evidence to support and uphold the validity of the purported will dated 14 February 2016. The appellant also failed to dispel the suspicious circumstances surrounding the making of the will dated 14 February 2016.

D [55] The integral ‘Declaration Form’ from Rockwills to prove Dr Ganeshwaran’s approval and declaration of the contents of the will dated 14 February 2016 as well as his soundness of mind was not produced at trial. In the absence of the ‘Declaration Form’ from Rockwills, the respondent submitted that an adverse inference under s 114(g) of the Evidence Act 1950 should be invoked against the appellant.

E [56] Consequently, the respondent submitted that the learned JC had overlooked the legal issues and had misconstrued the facts and evidence presented before him which led to his erroneous judgment which states that ‘Wasiat bertarikh 14.2.2016 yang dibuat oleh Si Mati, Dr Ganeshwaran a/l KT Balakrishnan adalah sah dan berkuatkuasa’.

F [57] Based on the ratio of *Gan Yoke Chin* together with the totality of evidence before the learned JC, the respondent prays that the cross-appeal dated 2 November 2018 be allowed with costs and para 1 of the order dated 9 August 2018 be varied.

G [58] The appellant on the other hand posed a question whether the respondent has succeeded in proving to the trial court whether Dr Ganeshwaran was in such a condition exactly one month before he passed away on 14 March 2016, ie on the date that he executed the will, which was on 14 February 2016. It was submitted that the answer is a very clear and resounding, no because there is absolutely no evidence before this court or the trial court other than the respondent’s wholly misguided assertions and testimony.

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[59] In this regard, the appellant draws reference to Dr Ganeshwaran's will dated 14 February 2016 which is not disputed and can be found at pp 406–410 of *rekod rayuan* (Jld 2E). The will on the face of it is rational and as such a presumption arises in law that the deceased, Dr Ganeshwaran had testamentary capacity.

A

B

DECISION

[60] The appellant's position is that the findings that 1/2 share of the house at No 62, Lebu Peria, Taman Radzi, 41200 Klang, Selangor Darul Ehsan is to be held on trust for the benefit of the respondent was erroneous. The respondent's position is that the findings of the learned JC were correct based on the material evidence and the decision is fair and reasonable.

C

[61] The respondent's position is that the will left behind by Dr Ganeshwaran's dated 14 February 2016 is not valid. The appellant's position is that the will is valid based on the material evidence found by the learned JC.

D

[62] We have read the appeal records and heard the submissions of both parties. We were of the view that the appellant's appeal to vary paras 2–6 of the order dated 9 August 2018 did not have merit. We found there is no error by the learned JC in arriving into his decision in respect of prayer 2–6 of the order involving the matrimonial asset at No 62, Lebu Peria, Taman Radzi, 41200 Klang, Selangor Darul Ehsan including the prayer that 1/2 share of the matrimonial asset is to be held on trust for the benefit of the respondent as the lawful wife to Dr Ganeshwaran.

E

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[63] Similarly, the respondent's appeal to vary para 1 of the order to the extent that Dr Ganeshwaran's will dated 14 February 2016 to be invalidated, rendered ineffective also did not have merit. We found there is no error by the learned judge in arriving into his decision that the said will is valid.

G

[64] It is our unanimous decision that both the appeal and cross-appeal are dismissed with no order as to costs.

H

[65] Our grounds are as follows:

(a) the respondent and Dr Ganeshwaran were married on 6 July 2003. Until his death, respondent was his lawful wife. During their marriage, the respondent and Dr Ganeshwaran had purchased the matrimonial home at No 62, Lebu Peria, Taman Radzi, 41200 Klang, Selangor Darul Ehsan on 31 May 2004 and had resided there since 2011 until Dr Ganeshwaran's untimely demise on 14 March 2016;

I

- A (b) the learned JC had considered the respondent and her mother's evidence in court with supporting documentary evidence that they have contributed financially to the monthly instalment payments as well as the deposit payment of the house. The appellant's witness SD2 failed to produce evidence to substantiate his assertion that he had paid for the house which he could have also produced proof of the same. Based on the evidence, the house in Klang is indeed a matrimonial asset for both the respondent and Dr Ganeshwaran who had indeed contributed to the matrimonial asset since 2006;
- B
- C (c) in the Court of Appeal case of *Ching Seng Woah v Lim Shook Lin* [1997] 1 MLJ 109; [1997] 1 CLJ 375, Justice Mahadev Shankar JCA held that 'matrimonial assets' refers to the matrimonial home and everything which is put into it by either spouse with the intention that their home and chattels should be a continuing resource for the spouses and their children to be used jointly and severally for the benefit of the family as a whole;
- D
- E (d) it was also provided in the English Court of Appeal case of *Wachtel v Wachtel* [1973] 1 All ER 829 (CA) that 'matrimonial assets' refers to 'family assets' ie those things which are acquired by one or other or both of the parties, with the intention that there should be continuing provision for them and their children during their joint lives, and used for the benefit of the family as a whole;
- F (e) in this case, the matrimonial asset is not subject to division under s 76 of the Law Reform (Marriage and Divorce) Act 1976 on reason that the respondent's marriage with Dr Ganeshwaran were dissolved naturally upon his death ('kes ini tidak melibatkan pembubaran perkahwinan ataupun perpisahan kehakiman');
- G (f) the learned JC divided the matrimonial asset and accordingly granted half share (1/2) of the matrimonial asset to be held on trust for the benefit of the respondent. The learned JC did not err in law and in fact. In the High Court case of *Wong Kim Foong (F) v Teau Ah Kau @ Chong Kwong Fatt* [1998] 1 MLJ 359; [1998] 1 CLJ 358, in respect of the division of matrimonial property, Justice Abdul Malik Ishak (as he then was) said the following:
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- I In considering the division of the matrimonial assets of the parties in the instant case, *it would be unfair, unjust and an affront to commonsense to divide the matrimonial assets in direct arithmetic proportion to the financial contributions towards the purchase of the properties*. If it was the intention of the parties that the two properties be apportioned according to their financial contributions, it should have been reflected in the title deeds.
- (g) Justice Abdul Malik Ishak (as he then was) had considered the English, Malaysian as well as Singaporean position with regards to

division of matrimonial property and had cited and referred to the maxim of 'Equity Leans Towards Equality'. Applying the equitable doctrine of *equity leans towards equality*, Justice Abdul Malik Ishak (as he then was) accordingly divided the matrimonial properties in equal shares between the parties instead of dividing the property following the amount the respective party have contributed. The learned judge held as follows:

The maxim that equity leans towards equality was once again demonstrated in *Nagapushani v Nesaratnam* [1970] 2 MLJ 8. *The facts in that case were that the defendant there had opened a savings account in the post office savings bank in his wife's name — the plaintiff, with an initial deposit of \$250. Later, on different occasions the defendant deposited various sums from time to time. The plaintiff too took steps and deposited the savings from the household allowance given to her by the defendant into the savings account. Subsequently the defendant purchased a piece of land at S\$17,500 out of which a sum of \$5,600 was paid from moneys drawn from the savings account of the plaintiff. The land was registered in the name of the defendant. In 1959 the defendant executed an assignment of his rights to the property in favour of the plaintiff. In 1961 the same property was reassigned by the plaintiff to the defendant and then in 1962 the defendant assigned it in favour of his mother. The plaintiff instituted a claim alleging that she was the beneficial owner of the property. It was held that there was a presumption of a gift to the plaintiff of the moneys deposited by the defendant into the plaintiff's savings account. The court also held that the savings from the household expenses belonged to the defendant. The court further held that as it was not possible to ascertain the exact portion contributed by each spouse, the rule that equity leans towards equality was applied and it was further held that both spouses had equal shares in the property.*

(h) in the present case, the respondent had contributed to the monthly repayment of the matrimonial property since 2006 and her parents have provided financial aid in respect of the purchase of the matrimonial property in 2004, it is our considered view that the learned JC had applied the correct maxim and division method in arriving to his judgment;

(i) the learned JC did not err when he held that Dr Ganeshwaran is holding the matrimonial asset on principles of a resulting trust for the respondent and a constructive trust is to be imputed and imposed on the matrimonial asset for the benefit of the respondent;

(j) the English Court of Appeal case of *Hussey v Palmer* [1972] 3 All ER 744 (CA), Lord Denning MR clearly stated that when one person contributes towards the purchase price of a house, the owner holds it on a constructive trust for him, proportionate to his contribution, even though there is no agreement between them, and no declaration of trust to be found, and no evidence of any intention to create a trust. Instances

- A are numerous where a wife has contributed money to the initial purchase of a house or property;
- B (k) a constructive trust is ‘a trust which is imposed by equity in order to satisfy the demands of justice and good conscience, without reference to any express or presumed intention of the parties (see the Court of Appeal case of *Tay Choo Foo @ Tay Chiew Foo v Tengku Mohd Saad @ Tengku Arifaad bin Tengku Mansur & Ors (all acting as administrators of the estate of Tunku Mansur bin Tunku Yaacob, deceased) and another appeal* [2009] 1 MLJ 289; [2009] 2 CLJ 363);
- C (l) the 1/2 share of the matrimonial asset for the benefit of the respondent in our view was a fair, just and reasonable division of the said matrimonial asset. The 1/2 share of the matrimonial asset that is being held on trust for the benefit of the respondent is to be excluded from Dr Ganeshwaran’s will dated 14 February 2016;
- D (m) the learned JC was correct to make a finding that the will is a valid and binding will. This means that Dr Ganeshwaran can only bequeath his ownership/share of the matrimonial property ie 50% to the appellant in this case, Premavathy a/p Balakrishnan whilst the remaining 50% belongs to the respondent;
- E (n) it is an agreed facts that after the grant of probate was issued, the respondent filed a citation at the Probate High Court on 21 December 2016. After the citation was served on Premavathy, her then solicitors, Messrs Sada Raman & Co, returned the grant of probate to the Probate High Court in Shah Alam on 3 February 2017. At the High Court the validity of the will in support of the probate comes into question, then the onus lies on those propounding the will to affirm positively the testamentary capacity;
- F (o) learned author *Sarkar on Evidence* (4th Ed, Vol 2) at p 1396 has this to say:
- G Wills —The law has been thus stated in two well-known cases: ‘These rules are two; first, that the onus probandi lies in every case upon the party propounding a will and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator. The second is, that if a party writes or prepares a will, under which he takes a benefit, that is a circumstance that ought generally to excite suspicion of the court, and call upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased’ [*Barry v Butlin*, 1938, 2 Moo PC 480, 482: 46 RR 123 (relied on and explained in *Harmes v Hinkson*, A 1946 PC 156: 50CWN 895) and *Tyrrel v Painton*, 1894 PD 151: 10LT453. See *Suryanarayana v Suramma*, A 1947 PC169; *Bai Gangabai v Bhagwan*, 29 B 530 PC: 9 CWN 769; *Gomtibai v Kanchhedilal*, A 1949 PC
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272). ‘Those who propound a will must show that the will of which probate is sought is the will of the testator, and that the testator was a person of testamentary capacity. In ordinary cases, if there is no suggestion to the contrary, any man who is shown to have executed a will in ordinary form will be presumed to have testamentary capacity, but the moment the capacity is called in question, then at once the onus lies on those propounding the will to affirm positively the testamentary capacity. Moreover, if a will is only proved in common and not in solemn form, the same rule applies even though the action is to attack a probate which has been granted long ago. These propositions will be found to be settled by *Barry v Butlin* (ante); *Cross v Cross*, 10 LT 70: 33 LJP 49 and *Tyrrall v Painton*,’ (ante)—per LORD DUNEDIN, in *Robins v National Trust Co Ltd*, 101 IC 903 PC: 1927 AC 515; see *Jatindra v Raj Lakshmi*, 57 CLJ 8; *Kameswara v Suryaprakasa*, A 1962 AP 178]. A propounder of the will has to prove its due and valid execution and if there are any suspicious circumstances he must remove them from the mind of the court — Facts to be considered on the question of due execution of will [*Venkatachala v Thimmajamma*, A 1959 SC 443].

(p) the Federal Court in *Ong Eng Hock & Anor v Ong Cheng Guan & Anor* [2018] 5 MLJ 701; [2018] 7 CLJ 154 held as follows:

[11] *The appellants obtained leave to appeal to this court on the following questions of law:*

- (i) Whether the probate rule that the burden of proving that the instrument so propounded is the last will and testament of the testator applies in a case where the impugned will has already been admitted into probate and a sealed grant of probate issued by the High Court? and
- (ii) Where the challenge to the impugned will is on grounds of forgery, and specifically that the executor had forged the will, whether the burden lies entirely on the challenger in proving forgery?

[12] For the appellants, it was orally submitted: (i) the Court of Appeal misunderstood the case before it; (ii) it was an action for revocation of the probate and not an action for grant of probate; (iii) the only issue was whether a false will was put forward to obtain probate; (iv) the grant of probate, even in common form, is conclusive as to due execution (learned counsel cited Williams, Mortimer and Sannucks on Executors, Administrators and Probate 20th edn at 40-02); and (v) s 34 of the Probate and Administration Act 1959 *should be read together with* O 72 r 13 of the Rules of Court 2012. For the first respondent, it was orally submitted: (i) rules of probate were not applicable to the case; (ii) when the will was challenged, the onus shifted to the propounders of the will; (iii) the grant of probate was immaterial; and (iv) there was no will in existence

[13] We agree that ‘those who propound a will must show that the will of which probate is sought is the will of the testator ... has to prove its due execution and valid execution and if there are any suspicious circumstances ... remove them from the mind of the court ...’ (*Sarkar on Evidence* (14th Ed,

- A Vol 2) at p 1396). That is so where probate is being sought. But probate was not sought in the instant case. The will had been propounded. Probate had been granted. After it had been probated, the will was challenged. But yet what was before the trial court was not an action for the grant of probate, but an action for revocation of the probate.
- B The Federal Court answers the questions in the following manner:
 Leave question 1: Whether the probate rule that the burden of proving that the instrument so propounded is the last will and testament of the testator applies in a case where the impugned will has already been admitted into probate and a sealed grant of probate issued by the High Court?
- C Answer: ‘Those who propound a will must show that the will of which probate is sought is the will of the testator ... has to prove its due execution and valid execution and if there are any suspicious circumstances ... remove them from the mind of the court ...’ But where a will has been admitted to probate, the person who seeks revocation of the probate has to establish sufficient cause.
- D Question 2: Where the challenge to the impugned will is on grounds of forgery, and specifically that the executor had forged the will, whether the burden lies entirely on the challenger in proving forgery?
- E Answer: Where the will has been admitted to probate, the person who seeks revocation of the probate on the ground of forgery has the burden and initial onus to prove forgery. Where the will has not been admitted to probate, it would appear from all cases decided that both propounder and challenger could not be absolutely freed from the burden and or onus of proof.
- F (q) the Federal Court decision in *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309 (FC) stated at p 12 (MLJ); p 322 (CLJ) that:
- G As regards the burden of proof, the Court of Appeal quite rightly stated the settled law ie that where the validity of a will was challenged, the burden of proving testamentary capacity and due execution lay on the propounder of the will as well as dispelling any suspicious circumstances surrounding the making of the will; that the onus of establishing any extraneous vitiating element such as undue influence, fraud or forgery lay with those who challenged the will. In this connection, we find the approach taken by the High Court of Australia in *William Henry Bailey & Ors v Charles Lindsay Bailey & Ors* [1924] 34 CLR 558 to be instructive. Therein Isaacs J said, inter alia:
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- I (1) The onus of proving that an instrument is the will of the alleged testator lies on the party propounding it; if this is not discharged, the court is bound to pronounce against the instrument.
- (2) This onus means the burden of establishing the issue. It continues during the whole case and must be determined upon the balance of the whole evidence.

- (3) The proponent's duty is, in the first place, discharged by establishing a prima facie case. A
- (4) A prima facie case is one which, having regard to the circumstances so far established by the proponent's testimony, satisfies the Court judicially that the will propounded is the last will of a free and capable testator. B
- (5) A man may freely make his testament, how old soever he may be; for it is not the integrity of the body, but of the mind, that is requisite in testaments.
- (6) The quantum of evidence sufficient to establish a testamentary paper must always depend upon the circumstances of each case, because the degree of vigilance to be exercised by the Court varies with the circumstances. C
- (7) As instances of such material circumstances may be mentioned: (a) the nature of the will itself regarded from the point of simplicity or complexity, or of its rational or irrational provisions, its exclusion or non-exclusion of beneficiaries; (b) the exclusion of persons naturally having a claim upon the testator; (c) extreme age, sickness, the fact of the drawer of the will or any person having motive and opportunity and exercising undue influence taking a substantial benefit. D
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- (8) Once the proponent establishes a prima facie case of sound mind, memory and understanding with reference to the particular will, for capacity may be either absolute or relative, then the onus probandi lies upon the party impeaching the will to show that it ought not to be admitted to proof. F
- (9) To displace a prima facie case of capacity and due execution, mere proof of serious illness is not sufficient: there must be clear evidence that undue influence was in fact exercised, or that the illness of the testator so affected his mental faculties as to make them unequal to the task of disposing his property. G
- (10) The opinion of witnesses as to the testamentary capacity of an alleged testator is usually for various reasons of little weight on the direct issue.
- (11) While, for instance, the opinions of the attesting witnesses that the testator was competent are not without some weight, the Court must judge from the facts they state and not from their opinions. H
- (r) it is the appellant who are the propounder of the will to prove that there was due execution of the will and to dispel any suspicious circumstances surrounding the making of the will. What amounts to due execution is found in a number of cases; I
- (s) the court held that it is clear law that the burden of proving testamentary capacity rested on the person alleging the validity of the will. The main issue in this case was whether the testator had a free

- A disposing mind (*Udham Singh v Indar Kaur* [1971] 2 MLJ 263 (FC)). The propounder to a will must prove that the testator knew and approved of the contents at the material time. He must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator *Ch'ng Kheng Phong v Chung Keng Huat & Ors* [2011] 8 MLJ 32);
- B (t) in *Sarah binti Abdullah @ Hew Lee Ling (P)* [1999] MLJU 586 (HC), the petitioner has to prove that the testator was of sound mind, memory and understanding and that the testator approved of and had knowledge of the contents of the will when the testator executed it and to prove affirmatively that the testator knew and approved of the contents of the document. The duty is to bring home to the mind of the testator the effect of his testamentary act and the burden may be discharged by showing that the testator, being of competent mind, had his will read over to him or that the testator knew and approved of the contents of the will and in this way sufficiently remove any suspicion which may have arisen (see *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97 (CA); *Eu Boon Yeap & Ors v Ewe Kean Hoe* [2008] 2 MLJ 868 (CA));
- C (u) the burden of proving *testamentary capacity* is on the party propounding the will. The above cases show that the person propounding the will must establish that testator:
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- (i) must understand the nature of his act;
 - (ii) the effect of his act;
 - (iii) the extent of the property of which he is disposing;
 - (iv) the claims to which he ought to give effect;
 - (v) understood the contents of the will;
 - (vi) he approved of contents of the will;
 - (vii) he had knowledge of the contents of the will when he executed it; and
 - (viii) had his will read over to him;
- (v) in the case of *Tan Cheu Kee v Lim Siew Hwa* [2016] MLJU 1599; [2016] 1 LNS 1684 which had summarised the position in law that:
- [21] In applying these principles, and particularly the test in *Banks v Goodfellow*, I have focused my mind to the determination of whether the deceased suffered from any 'disease of the mind' and/or 'insane delusion' when he executed the will and whether the circumstances leading to his act of committing suicide impairs testamentary capacity. Having sifted through the evidence, I do not find any evidence showing that the deceased suffered from

any disease of the mind nor was delusional to the extent of insanity. The evidence of the witnesses who had interacted with the deceased immediately prior to him executing the will does not indicate any disease or infirmity of mind. Neither does the circumstances that led to the suicide indicate unsoundness of mind. There is absolutely no medical evidence to support the defendant's contention that the deceased was of unsound mind when he executed the will ...

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... [24] Thus, considering the totality of evidence, and particularly the deceased's interactions with witnesses who testified at trial, I am convinced that in executing the will, the deceased understood the nature and effect of making a will as well as the extent of the property he was disposing and to whom he was disposing them to. And since the deceased is shown to have testamentary capacity, the testator's will must be give effect to. ...

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(w) on the point of the testator's testamentary capacity, the appellant referred to the decision of His Lordship Gopal Sri Ram JCA in *Tho Yow Pew & Anor v Chua Kooi Hean* [2002] 4 MLJ 97; [2002] 4 CLJ 90 in particular pp 100–101 (MLJ); para h on p 93 and para a on p 94 (CLJ) which is para-phrased below:

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... Now, the law upon the subject of a testator's testamentary capacity, we find to be well settled. The decided cases show quite clearly that very slight testamentary capacity is required for the making of a will. The cases in which wills have been held invalid for lack of testamentary capacity involve testators who were utterly insane either upon the finding of the probate court or by reason of an order appointing a committee on the ground of insanity of the testator.

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What the law requires to vitiate testamentary capacity is an insane delusion existing at the time of making of the will. This will include insanity at the time of the making or giving instructions for the making of the will. There are numerous authorities on the point. We find it quite unnecessary to deal with all of them here ...

G

(x) in *Carmel Mary Soosai v Josephine Lourdasamy Ratnavathy R Soosai & Ors* [1987] CLJ Rep 498 in particular paras b–f and para h on p 501 which is para-phrased below:

... I now turn to the next allegation raised by the caveators, ie, the deceased's lack of testamentary capacity due to ill-health.

H

It is not disputed that at the time of his death, the deceased was a chronic diabetic. He had already lost sight of his left eye and was slowly losing sight of the other. The medical evidence shows that he had been a chronic diabetic for at least 5 years before his death and this had led to his undergoing an operation on 9 January 1982 to remove his prostate gland. Prior to that, on 27 November 1981, he had also undergone a cataract operation to correct his eye but this operation turned out to be unsuccessful as he had an irreversible damaged optic nerve which was already there before the operation. DW6, who provided the follow-up treatment after the operation, did not rule out of

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- A the possibility that the deceased's chronic diabetic condition could have caused the blindness to his left eye.
- B The 3 doctors who examined and treated him of his various ailments, DW4 for his diabetic, DW5 who performed the prostate gland operation and DW6 who did the follow-up treatment of his left eye, all agreed that they were not competent to testify to the deceased's mental capacity during the period the will was executed as they have no professional qualifications. However, a psychiatrist of 28 years' standing, DW1, was more than prepared to testify that every person who suffers diabetes suffers mental incapacity. The most significant aspect of DW1's evidence is that he never saw or examined the deceased, and that his conclusion was based largely on his vast experience in the field of psychiatric medicine and on the medical report of DW4, DW5 and DW6 who examined and treated the deceased during the relevant period.
- C The deceased was an accountant and he managed his own firm, assisted by 3 employees who were not professionals. There is also evidence to show that during the period of ill-health, apart from the time when the deceased had to be hospitalized and after his 2 operations, followed by a period of recovery, he continued working in his office, keeping to his regular hours from 10.00 until 5.00 p.m with a break for lunch. He continued doing so up to the day before his death ...
- D ... On the consideration of all evidence pertaining to the deceased's mental capacity, the opinion of DW1, who never saw or examined the deceased cannot carry any weight ...
- E (y) we agreed with the appellant that in this case there were no issues regarding the mode of execution of the will or in respect of formal compliance with s 5 of the Wills Act 1959;
- F (z) s 5 of the Wills Act 1959 states:
- G 5(1) No will shall be valid unless it is in writing and executed in manner hereinafter mentioned.
- H (2) Every will shall be signed at the foot or end thereof by the testator or by some other person in his presence and by his direction; such signature shall be made or acknowledged by the testator as the signature to his will in the presence of two or more witnesses present at the same time, and such witnesses shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary: Provided that every will shall, as far only as regards the position of the signature of the testator, or of the person signing for him as aforesaid, be deemed to be valid under this section if the signature shall be so placed at or after, or following, or under, or beside, or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will; and no such will shall be affected by the circumstance —
- I (a) that the signature shall not follow or be immediately after the foot or end of the will;

- (b) that a blank space shall intervene between the concluding word of the will and the signature; A
 - (c) that the signature shall be placed among the words of the testimonium clause or of the clause of attestation, or shall follow or be after or under the clause of attestation, either with or without a blank space intervening, or shall follow or be after, or under, or beside the names or one of the names of the subscribing witnesses; B
 - (d) that the signature shall be on a side or page or other portion of the paper or papers containing the will whereon no clause or paragraph or disposing part of the will shall be written above the signature; or C
 - (e) that there shall appear to be sufficient space on or at the bottom of the preceding side or page or other portion of the same paper on which the will is written to contain the signature, and the enumeration of the above circumstances shall not restrict the generality of this proviso; but no signature shall be operative to give effect to any disposition or direction which is underneath or which follows it, nor shall it give effect to any disposition or direction inserted after the signature shall be made. D
- (aa) the uncontroverted evidence of Leow Kim Meng (SD3) and Hong Pek Boey (SD4), both from Rockwills who witnessed the execution of the will by Dr Ganeshwaran shows that the technical and/or formal statutory requirements of s 5 of the Wills Act 1959 had been complied with. The respondent in this case did not challenge formal compliance; E
- (ab) the appellant, Premavathy has complied with having regard to the testimony adduced is that, the will propounded is the last will of a free and capable testator. The appellant, had established a prima facie case of sound mind, memory and understanding with reference to the particular will; F
- (ac) when referred to Dr Ganeshwaran's will dated 14 February 2016 which is not disputed and on the face of it is rational and as such a presumption arises in law that the deceased, Dr Ganeshwaran had testamentary capacity. The will names Dr Ganeshwaran's mother Sarojini a/p P Doraisamy as the executor. However, if she is unable or unwilling to act for any reason, then Dr Ganeshwaran appoints his sister Premavathy a/p Balakrishnan as an alternate executor. Further, under the will, Dr Ganeshwaran makes specific gifts and dispositions of his assets including bank accounts, insurance policies, Employees Provident Fund account, unit trust/mutual funds investments, motor vehicles, the Klang house as well as securities/investments listed on the Securities Exchange of Bursa Malaysia to specific beneficiaries. Dr Ganeshwaran's intentions were expressed in his will in simple, clear and rational terms, thus evidencing his capacity to make rational disposition of his property(ies); G
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- A (ad) the respondent had produced a medical report dated 1 November 2016 from Dr Ganesanathan and which is marked as 'ID1' (see p 11, *rekod rayuan* (Jld 2C). Dr Ganesanathan the Gastroentologist in his medical report had noted that the deceased had 'decomposed liver deceased with 'encephalopathy'. The term 'encephalopathy' means that
- B the patient is suffering from some form of brain damage to the brain and/or malfunction of the brain. The term 'encephalopathy' can present a very broad spectrum of symptoms that range from mild as some memory loss or subtle personality changes, so severe, such as dementia, seizure, coma or death;
- C (ae) the contents of 'ID1' were never agreed upon by the appellant and remained as 'ID1' until the end of proceedings. The respondent was given the option as to whether they intended to call Dr Ganesanathan, the maker of 'ID1' to tender the medical report and make him available
- D for cross-examination and to testify on behalf of the respondent. The respondent did not intend to call Dr Ganesanathan the Gastroentologist, to testify in court in these proceedings and will therefore close their case (see *rekod rayuan* (Jld 2A) notes of proceedings (15 March 2018); p 200 line 21–211);
- E (af) we agreed with the appellant that in such case, there is no independent medical evidence before the trial court or this court to substantiate the respondent's assertions that Dr Ganeshwaran did not have the testamentary capacity to execute the will which he executed on
- F 14 February 2016. Thus, the issue of Dr Ganeshwaran's mental health was not proven at any point in time;
- (ag) in *Yoong Sze Fatt v Pengkalen Securities Sdn Bhd* [2010] 1 MLJ 85 in particular the decision of Abdul Malek Ishak JCA at para [55]–[59] at pp 504–505 which is para-phrased below:
- G ... [55] Section 51 of the Evidence Act 1950 states that whenever the opinion of any living person is relevant, the grounds on which his opinion is based are also relevant. The courts have said, time and again, that a bare expression of opinion has no evidentiary value at all (*Sim Ah Song & Anor v Rex* [1951] MLJ 150; *Lai Yang Koon v Public Prosecutor* [1962] MLJ 327; and *Public Prosecutor v Yiau Swee Tung* [1999] 3 MLJ 353). Brown, Acting CJ in *Sim Ah Song & Anor v Rex* at p 151 aptly said:
- H
- I The business of an expert witness is to draw upon the store of his knowledge and experience in order to explain some matter which his experience should qualify him to understand. He is quite entitled to express his opinion, which indeed is the natural corollary of his explanation. But a bare expression of his opinion has no evidential value at all. Unless he gives an explanation which supplies the understanding of the subject which the court lacks, the court is in no better position than it was before to determine the question which it is its duty to determine, and if

the court acts upon a bare expression of the expert's opinion the determination of the question becomes that of the expert and not of the court.

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[56] So, the court must be vigilant and must satisfy itself that the 'expert' is indeed an expert specially qualified. Here, the 'expert' report tendered by the first defendant's trial counsel failed to comply with the simple preliminary requirements of establishing the 'expert's' qualifications and for this reason, it should be disregarded ...

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... [58] As an opinion evidence, the expert must come to court to give evidence. Section 60(1)(d) of the Evidence Act 1950 states that direct oral evidence must be given in respect of the opinion of any person. Thus, in the absence of such direct evidence from the 'expert' his report cannot in law be admissible as evidence. The lack of opportunity to cross-examine the 'expert' on his report is another ground to disregard the 'expert' report. ...

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(ah) it is very clear that the issue that falls to be tried in this matter as to whether Dr Ganeshwaran's will dated 14 February 2016 is valid or not, ought to be decided in favour of it being valid and hence upheld for the following reasons:

D

(i) the learned JC had the benefit of listening to the first hand testimony of SD3 ie Mr Leow Kim Meng from Rockwills who prepared the will dated 14 February 2016 on Dr Ganeshwaran's instructions as well as listening to the testimony of SD4 ie Miss Hong Pek Boey also from Rockwills who witnessed the will together with Mr Leow Kim Meng;

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(ii) a careful scrutiny of the testimony of SD3 would lend credence to the fact that Dr Ganeshwaran was very clear in his mind when he gave instructions to SD3 during their first meeting;

(iii) at the second meeting, Dr Ganeshwaran after having read the draft will was equally clear in his mind when he proposed some minor amendments after approving the contents of the draft Will showed to him by SD3;

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(iv) finally at the third meeting with SD3 and in the presence of SD4, Dr Ganeshwaran read, approved and executed his will dated 14 February 2016 wherein both witnesses (SD3 and SD4) also witnessed the will;

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(v) the very simple question before the court is that, where is the evidence to show that Dr Ganeshwaran did not have the testamentary capacity and may not have understood the process and effect of making the will dated 14 February 2016;

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(vi) there is not even an iota of medical evidence or testimony before the court that, on 14 February 2016, when Dr Ganeshwaran executed

- A** his last will and testament, his state of mind was such that he was incapable of executing the said will?
- B** (vii) in fact to the contrary, the testimony and evidence given by both SD3 (Mr Leow Kim Meng) and SD4 (Ms Heng Pek Boey) from Rockwills points to the lucidity and clarity of Dr Ganeshwaran mind and actions when he executed his will dated 14 February 2016;
- C** (viii) from all the evidence that has been led before the court, there was nothing suspicious about the will dated 14 February 2016 executed by Dr Ganeshwaran;
- D** (ix) the respondent's argument based on the issue that a copy of the declaration form executed by all the parties was never produced at trial. The evidence of SD3 (Mr Leow Kim Meng) is very clear in that the declaration form is in effect an internal Rockwills company document and does not form part of the will;
- E** (x) the will which is in existence has complied with all the formal requirements particularly as laid down by s 5 of the Wills Act 1959. The declaration form merely lays out the practice of Rockwills when a will is executed. It cannot supersede or override the provisions of the Wills Act 1959, which have all been complied to the letter;
- F** (xi) the respondent also raised issue of the fact that both SD3 and SD4 failed to identify Dr Ganeshwaran from a family photograph (exh P35) which was shown to them at trial. The fact that the family photograph of exh P35 has three identical looking persons (including Dr Ganeshwaran and his two male siblings can be accepted as reasonable omission of identification (see p 234, *rekod rayuan* (Jld 20));
- G** (xii) SD3 has given clear evidence that he is not able to recollect any facial recognition of Dr Ganeshwaran due to the passage of time, as two years has passed since he attended to and serviced him, until the date of his testimony in court. SD4 had likewise given testimony that she had met Dr Ganeshwaran only once during the execution of the will; and
- H**
- I** (xiii) however due to the reasons above, despite the lack of facial recollection, it is abundantly clear that both SD3 and SD4 had vivid recollections of Dr Ganeshwaran's mannerisms and what transpired, as well as how and where the will was executed;

(ai) based on the aforesaid, we agree with the appellant that there is nothing suspicious about the will that was prepared by SD3 and executed by Dr Ganeshwaran and witnessed by SD3 and SD4 on 14 February 2016;

(aj) be that as it may, we noted the learned JC held at the last line of para 35 of the grounds of judgment as follows:

Sekalipun, wasiat itu sah, si mati tidak boleh melupakan bahagian plaintif di dalam rumah yang dipertikaikan melalui wasiat itu. Di dalam keadaan tersebut, *kesahan wasiat itu sudah tidak relevan lagi untuk diputuskan oleh mahkamah ini.*

(ak) the learned JC did not err when he held that the validity of the will is not relevant issue for determination of court after making finding that the deceased or his estates holds respondent's share in the said house on resulting trust and that the deceased cannot bequest the respondent's right and interest on the disputed house because the respondent's share is not part of the deceased property. In other words, the deceased could not will a property when at the material time he had no absolute control over the property.

[66] We were satisfied that the learned JC did not err in law and in fact, he had considered all the available evidence (documentary as well as oral evidence) that was presented before him. He had evaluated the testimonies and the demeanour of witnesses and had accordingly given a comprehensive and thorough analysis of his findings. In consequence thereof, the grounds advanced by the appellant and the respondent in respect of the appeal and cross-appeal are without any merits and untenable.

CONCLUSION

[67] In the result, it is our unanimous decision that the appeal and the cross-appeal have no merits. The appeal and cross-appeal is dismissed with no order as to costs.

Appeal and cross-appeal dismissed unanimously.

Reported by Ashok Kumar

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